

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 5, 2007

HUEY STRADER v. GEORGE LITTLE, COMMISSIONER, ET AL.

**Appeal from the Chancery Court for Davidson County
No. 06-71-III Ellen Hobbs Lyle, Chancellor**

No. M2006-02652-COA-R3-CV - Filed December 20, 2007

Inmate Huey Strader (“Plaintiff”) sued the Tennessee Department of Correction (“TDOC”) and TDOC Commissioner George Little (“Little”) in an effort to rescind a waiver which provided for recalculation of his sentencing credits pursuant to a statute that went into effect after his sentencing date. The Trial Court found that Plaintiff failed to file a completed summons with the Clerk and Master’s office for service upon TDOC, even after the Trial Court directed the Clerk and Master to send two summonses to Plaintiff for that purpose. Little, who had been properly served, filed a Motion to Dismiss, alleging that, as a state officer, he was not a proper party to the lawsuit and that the suit could not proceed because TDOC had not been made a defendant. The Trial Court granted Little’s Motion to Dismiss. The Trial Court also dismissed Plaintiff’s claim against TDOC because Plaintiff failed to file a separate summons for TDOC and, as a result of Plaintiff’s inaction, TDOC had not been served with a summons. Plaintiff appeals. After a thorough review of the record, we find that Plaintiff did comply with the Trial Court’s order by returning a summons to the Clerk and Master’s office to be served on TDOC. Therefore, we vacate the Trial Court’s dismissal of Plaintiff’s claim against TDOC. We affirm the Trial Court’s grant of Little’s Motion to Dismiss.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated in Part
and Affirmed in Part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Huey Strader, Clifton, Tennessee, *pro se* Appellant.

Robert E. Cooper, Attorney General & Reporter, Michael Moore, Solicitor General, and Pamela S. Lorch, Senior Counsel, Nashville, Tennessee, for the Appellee, George Little, Commissioner of the Tennessee Department of Correction.

MEMORANDUM OPINION¹

I. Background

In 1975, Plaintiff began serving a 99-year sentence as a TDOC inmate. Plaintiff asserts that under the laws then in effect, he would have to serve in the range of 40 to 50 years of his sentence before being released. In 1986, Plaintiff signed a waiver to permit TDOC to recalculate his sentence under newly enacted sentencing statutes “for the sole and exclusive purpose of receiving Sentence Reduction Credits.” Plaintiff claims, however, that this recalculation of Plaintiff’s sentence resulted in a later sentence expiration date than he had under the old law. On January 9, 2006, Plaintiff filed a Petition for a Declaratory Judgment against TDOC and Little, which stated in part as follows:

By law, [Plaintiff] would fully expire his 99 year sentence about 2014, but with the illegal removal of mandatory Good and Honor Time, the TDOC has calculated that he will not fully expire his sentence until about 2050. . . . Convicts may not be the brightest group of persons but, not a single one of them will agree to serve more than 60 years on a sentence when they can serve less than 40 years. [Plaintiff] may have been duped into signing a waiver that did exactly that.

On April 10, 2006, the Trial Court entered an order stating that Plaintiff had failed to file a separate summons for each defendant and directing the Clerk and Master to send two summons forms to Plaintiff. On June 6, 2006, the Trial Court entered an order confirming that Plaintiff had perfected service on Little but had failed to serve TDOC because he never filed a separate summons for service on TDOC. The Trial Court permitted the lawsuit to proceed against Little but ordered that no claims could be prosecuted against TDOC until it was served.

Little filed a Motion to Dismiss on July 3, 2006. Less than two weeks later, Plaintiff filed a Reply in Opposition to Dismissal with which he enclosed an original and duplicate summons for TDOC and a copy of Plaintiff’s Petition for Declaratory Judgment to be served on TDOC. The record before us on appeal contains the original and duplicate summons for TDOC and the copy of Plaintiff’s Petition for Declaratory Judgment to be served on TDOC as filed by Plaintiff in accordance with the Trial Court’s order. Despite the fact that the original and duplicate summons for TDOC and the service copy of Plaintiff’s Petition for Declaratory Judgment are in fact contained in the record, the Clerk and Master’s office never acknowledged receipt of the TDOC summons, and the summons never was issued or served on TDOC. The Clerk and Master’s office received a letter dated September 8, 2006, from Plaintiff inquiring about the status of service on TDOC. In this letter, Plaintiff stated that he had mailed the TDOC summons to the Clerk and Master’s office on or about

¹Rule 10 of the Rules of the Court of Appeals provides: “This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated ‘MEMORANDUM OPINION,’ shall not be published, and shall not be cited or relied on for any reason in any unrelated case.”

July 11, 2006, to be served on TDOC but had not been notified as to whether service was accomplished.

On September 13, 2006, the Trial Court granted Little's Motion to Dismiss, holding that "Tennessee law does not permit actions for declaratory judgments to be brought against State officials" and state law "requires that the agency whose decision is challenged must be made a party to the lawsuit." At the same time, the Trial Court also dismissed Plaintiff's claim against TDOC for Plaintiff's failure to comply with the Trial Court's order to file a summons and copy of the petition with the Clerk and Master for service upon TDOC. Plaintiff appeals.

II. Discussion

Plaintiff presents the following issue for our review:

1. Whether the Tennessee Department of Correction illegally calculated Plaintiff's sentence in violation of his constitutional rights.

Although the issue identified by Plaintiff is the basis of his lawsuit against Little and TDOC, it is not the reason the Trial Court dismissed his petition. Furthermore, Plaintiff discusses only the merits of his lawsuit in his appellate brief and never addresses the reasons for the Trial Court's dismissal. Rule 13(b) of the Tennessee Rules of Appellate Procedure provides that "[r]eview generally will extend only to those issues presented for review." Tenn. R. App. P. 13(b). If an appellant fails to raise an issue on appeal, that issue is generally deemed waived. *See, e.g., Frye v. St. Thomas Health Servs.*, 227 S.W.3d 595, 614 (Tenn. Ct. App. 2007); *Abouelata v. Davis*, No. E2005-02616-COA-R3-CV, 2006 WL 3193685, at *3 (Tenn. Ct. App. E.S., Nov. 6, 2006); *Blair v. Badenhope*, 940 S.W.2d 575, 576-77 (Tenn. Ct. App. 1996). In accordance with this rule, we find that Plaintiff waived the issue of the Trial Court's dismissal of Little from this lawsuit.

However, in certain circumstances, we may, in our discretion, "consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process." Tenn. R. App. P. 13(b). We find that this is an appropriate case in which to exercise our Rule 13(b) discretion as to the dismissal of the suit against TDOC. Therefore, we shall review the Trial Court's dismissal of Plaintiff's petition based on Plaintiff's alleged failure to file a summons on TDOC and have TDOC served as a defendant.²

In a non-jury case such as this one, we review the record *de novo* with a presumption of correctness as to the trial court's determination of facts, and we must honor those findings unless there is evidence which preponderates to the contrary. Tenn. R.App. P. 13(d); *Bogan v. Bogan*, 60

²Although Plaintiff did not raise this issue in his appellate brief, Plaintiff did file a motion with the Appellate Court Clerk asking this Court "to take judicial notice of the fact, plainly contained in the record, that [Plaintiff] complied with the Chancery Court's order to send a summons in duplicate for the Tennessee Department of Correction." Therefore, Plaintiff attempted to bring this matter to the Court's attention, albeit in an unorthodox manner.

S.W.3d 721, 727 (Tenn. 2001). A trial court's conclusions of law are subject to a *de novo* review with no presumption of correctness. *S. Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In its Memorandum and Order dismissing Plaintiff's petition, the Trial Court described its efforts to determine whether a summons for TDOC had been filed by Plaintiff as ordered by the Trial Court. These efforts by the Trial Court were made after Plaintiff's letter to the Clerk and Master's office asserting that Plaintiff, in fact, had returned the completed summons for TDOC in compliance with the Trial Court's previous order:

Appended hereto as Exhibit 2 is a copy of the screen of the docket entries in this case. It shows no summons filed by the petitioner for the Tennessee Department of Correction. Additionally, the Court's assistant performed a computer search of the Chancery Court Case Management system for any summonses filed in any cases from July 10, 2006, through July 20, 2006. No summons [sic] were filed in any cases in which the petitioner is a party.

Although the Trial Court's computer-assisted searches did not reveal the summons for TDOC, the original TDOC summons and a duplicate of the completed summons are, indeed, part of the record on appeal. Plaintiff, as ordered, mailed these documents to the Clerk and Master's office so that they could be filed, issued, and properly served on TDOC. When Plaintiff failed to receive notice that TDOC had been served, Plaintiff sent a letter to the Clerk and Master's office inquiring about the status of the case and whether TDOC had been served. Plaintiff complied with the Trial Court's order and did all that he could do to ensure that service of process was perfected on TDOC. Plaintiff is not to blame for the fact that the TDOC summons filed by him in compliance with the Trial Court's order does not appear in the computerized records of the Clerk and Master's office. Therefore, we hold that the Trial Court erred in dismissing Plaintiff's case against TDOC.

III. Conclusion

After careful review, we affirm the Trial Court's dismissal of Little as a defendant to this lawsuit. However, we vacate the portion of the Trial Court's judgment dismissing TDOC as a defendant and remand for further proceedings consistent with this opinion, including the issuance and service of the summons on TDOC. Exercising our discretion, costs on appeal are taxed against the Tennessee Department of Correction.

D. MICHAEL SWINEY, JUDGE